**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF ILLINOIS**

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| MARK HALE, et al., | ) | |
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| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | No. 12-cv-00660-DRH-SCW |
| | ) | |
| STATE FARM MUTUAL AUTOMOBILE | ) | |
| INSURANCE COMPANY, et al., | ) | |
| | ) | December 13, 2018 |
| Defendants. | ) | |

**FINAL FAIRNESS HEARING**
**BEFORE THE HONORABLE DAVID R. HERNDON**
**UNITED STATES DISTRICT COURT JUDGE**

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Proceedings recorded by mechanical stenography; transcript produced by computer.

***(Proceedings convened in open court at 9:02 a.m.)***

***THE COURT:*** Let's go ahead and let the record reflect that we're in open court. We've called the matter of *Hale, et al. vs. State Farm Mutual Automobile Insurance Company, et al.* The case number is 12-660. We have all of the appearances on our sheet here, so we'll take care of that in the record.

The first thing we have set is the rule to show cause. I have a notice from Mr. Downton that he's unable to be present. Is he in the courtroom by any chance? No? All right.

So, his declaration, as he calls it, states that he has quite a number of medical problems. He's in the process of moving from Nashville to Canada, and in the midst of all that has been intermittently hospitalized for gallbladder issues, and so for the reasons previously stated, which are his objections to being ordered to be present, together with all of these medical issues, he can't be here. Now, he did not file a motion to continue. I do have a note from -- or, rather, an order from the Seventh Circuit entered last night at 9:22 p.m. denying the petition for writ of mandamus.

So, in order to perhaps avoid an appealable issue, Mr. Clifford, my thought was that I would perhaps pass on the rule to show cause but rule on the merits of the objection. What's your thought about that?

***MR. CLIFFORD:*** That would be fine with us, Your Honor. Robert Clifford for the record. And, so, if I may then, I've been the designated maitre d'. I was called last night the maitre d', not the moderator, so --

***THE COURT:*** Does that mean I'm going to get to eat in this deal?

***MR. CLIFFORD:*** Well, the only thing between lunch -- you know, us and lunch is you, so --

***THE COURT:*** And when we're done you can show us to a fine table, I take it?

***MR. CLIFFORD:*** Yes, sir. So, with your permission then, I'd like to introduce a couple of people to you just for the record.

***THE COURT:*** Absolutely.

***MR. CLIFFORD:*** You know, Your Honor, this litigation has, when coupled with the *Avery* case, a couple of decades of history in the court. And throughout that time the class representatives, Mark Hale, who's in the courtroom today from Ava, New York, which is near Syracuse, Mr. Hale has faithfully performed his duties as a class representative and has attended many proceedings and been deposed. And I'd like to, on behalf of the class counsel, acknowledge his presence and his participation and his undying and unwavering support for this cause.

Along with him is Mr. Todd Shadle, who -- from

Dallas, Texas, who similarly has participated throughout this cause at great, not only expense, inconvenience, but commitment to seeking a just result in this case as he has. And then, of course, Ms. Laurie Loger, who Your Honor, I believe, has met. Laurie is from LaSalle, Illinois, who was here during selection of the jury, but I would be remiss -- we would be remiss on behalf of the class if we did not acknowledge their service and significant support and participation in helping us prosecute this claim.

So, to that end, and skipping over the rule to show cause matter, I'd like to introduce Mr. Robert Nelson from the Lieff Cabraser firm who will present our motion and arguments.

***THE COURT:*** Okay. Thanks. So which one's Mr. Hale, by the way? So, if someone tells you they heard me say, "That darn Hale," I wasn't talking about you personally; I was only talking about the case, sir.

***MR. HALE:*** Yes, sir.

***THE COURT:*** I'm sure glad to see you're here.

Mr. Nelson?

***MR. NELSON:*** Good morning, Your Honor. I'm Robert Nelson on behalf of plaintiffs.

Your Honor, it's been a long road for us, and now we get to talk about final approval of the settlement. When we filed our papers in October we hadn't yet had the new

Rule 23(e)(2) in place. Obviously, starting December 1, it is in place and it is the law of the land, and I think it's incumbent on us, since we didn't necessarily brief it that way, that we argue it right now before Your Honor.

We did mention the Rule 23(e)(2) factors in our reply papers, but I'm happy to go through them individually because I wouldn't say it's any different than what the law was before in the Seventh Circuit. Seventh Circuit had many factors that you consider in connection with final approval but I think the new rule sintolizes [phonetic] them in a different way perhaps, and so with the Court's permission I will go through those factors.

So the rule, the new Rule 23(e)(2) describes four factors to be looked at in connection with final approval. The first is that the class representatives and class counsel have adequately represented the class. The second is that the proposal was negotiated at arms length. The third is whether or not the relief provided for the class is adequate. And, finally, the rule asks whether or not the proposed settlement treats class members equitably relative to each other.

If we were to go through each of these factors, Your Honor, in terms of adequacy of representation, as Mr. Clifford just advised, our class representatives have been steadfast in connection with their case and in their

commitment to representing the class, and I don't think there's any issue with regard to their representation of the class's interests throughout the many years of this litigation.

I would suggest, Your Honor, the same holds true with class counsel. We have been more than adequate in terms of representing the class. We've taken on every challenge, every motion, and, as the Court knows, there have been many of them. In fact, we've counted them and there are more than a hundred motions that have been filed in connection with this case, and so I would submit that the adequacy issue should not be at issue. That is, class counsel and the class representatives have done their job and then some.

In terms of the second factor, the arms length negotiations in connection with this case, I don't think there can be any question about that. The Court is aware there was a mediation, Court-ordered mediation undertaken by Judge Holderman. That process lasted more than a year. It ended unsuccessfully. The parties were too far apart. I think that of itself suggested there was no collusion in connection with this case, but then again, we had negotiations kick up shortly before trial, and, again, those mediations and settlement discussions were overseen by a Court-appointed mediator, Randi Ellis. And as the Court is

well aware, those negotiations were contentious, difficult, and at arms length, and very arms length. So, again, I would say there's no question as to whether or not this second Rule 23(e)(2) factor is met here.

The third factor is whether or not the adequacy -- whether the relief provided is adequate in light of the risks incumbent in the litigation. And in thinking about the risks of this case, there were just so many, and so many that appeared insurmountable at the beginning of this litigation. And I don't necessarily need to recount them all, but the Court is well aware of all the dispositive motions, motions to dismiss, motions for summary judgment on *Rooker-Feldman*, motions for summary judgment on the statute of limitations, res judicata, one issue after the next, and these were difficult, difficult issues. The risk of *Noerr-Pennington* remained until the onset of trial. Each and every one of those risks have to be considered when considering the total value of the settlement and what counsel were able to achieve on behalf of the class. And when you do that, I think there's no question but that the $250 million settlement is adequate in light of those risks.

Now, the objector, Marlow, argues otherwise and suggests that there was little risk here because the Seventh Circuit had heard several of the major arguments and so there was no question, of course, that we would have

prevailed on appeal, and so there was very little risk. I think we can give short shrift to that argument because it's just not true. The Seventh Circuit didn't rule substantively on any matter. It ruled pursuant to its manifest error standard in connection with some of the risks that were taken. And in terms of class cert, again, it did not rule on the substance, denied the motions, but whether or not they would have done the same post-trial is completely another story.

And, in addition, counsel for the objector, Marlow, argues that there was really very little jury risk here, that the jury, of course, would have ruled the way we had hoped they would, but I don't believe the objector spent hundreds of thousands of dollars and spent hours with jury consultants and focus groups and the like, and class counsel did, and we made realistic judgments based on the information that we were able to obtain and spent a lot of money and a lot of time and a lot of effort to try to really understand the risks incumbent in this case.

Marlow also argues that the amount of settlement is too small because it would -- it was obvious that we would have gotten $7 billion in this case and that there was very little alternative other than $7 billion. Obviously, that doesn't take into account a lot of things. There's no question that there was a real issue as to whether or not we

could have ever achieved post-judgment interest in this case. There was -- we talked about post-judgment interest. In *Avery*, there was never a judgment entered, a final judgment entered in *Avery*. It was a novel, difficult argument, but he assumes, of course, that we would win it; "he" meaning counsel for Marlow.

Marlow also doesn't acknowledge that, when considering the adequacy of a settlement, courts are not to look at the trebling aspect of the settlement. We've provided to Your Honor case law that demonstrates that in determining adequacy you do not look at the trebling value, and so we cited a number of cases to that effect. So when you look at the value that we were able to obtain for the class relative to the substantial risks, we submit, Your Honor, that that third 23(e)(2) factor is met readily.

In considering that 23(e)(2) factor, the Court -- excuse me. Rule 23 identifies a number of factors, sort of sub-factors, that is romanette (i) through (iv) in the new Rule 23(e)(2). The second romanette is the effectiveness of any proposed method of distributing relief to the class. And I would submit, Your Honor, that, in connection with that, this settlement is quite innovative in that we have made it extremely easy for people to participate. In fact, for over a million class members payments will take place automatically because they're in our system. We know who

they are, State Farm's helped identify them, and they will get payment automatically without having to submit a claim form. And that's -- you know, the drafters of the rule, the new Rule 23(e)(2), were very concerned about that there are obstacles making it difficult for class members to make claims. We've tried to address that and I think we've done a very good job. , And our claim form is very straightforward, easily understandable, and so I think we met that burden as well.

The third romanette is the terms of any proposed award of attorneys fees. And I think what the drafters are getting at there is whether or not the lawyers are being paid for work that didn't benefit the class in some way. So, for example, if you had a claims made type settlement and you said the settlement was, say, a hundred million dollars, but, in fact, it only turned out to be 20 or $30 million because people didn't show up to make their claims, and you can't compensate the lawyers based on that full value. But here, there's no question that the class is getting the full value. That is, everything that doesn't go to class counsel in terms of their fees and costs, all of that goes to the class. There's no -- there's nothing else, nowhere else it can go. It's nonreversionary, the funds, so there's no question that we meet that requirement as well.

Finally, the fourth romanette is whether or not the

agreement is required to be -- whether there's any side agreement in connection with the case, and here there is none, so I think we meet that factor as well. Those are the four romanette factors in the 23(e)(C) provision.

And then, finally, there is (D), which is whether or not class members are being treated equitably, and I think we have done our best in that area as well because, as the Court will recall, in the *Avery* case there never was a final -- we never got to the damages phase in terms of allocating who was going to get what, and, as such, we basically concluded that all of our *Hale* class members essentially had an undivided interest in that *Avery* judgment way back when. And so we think that they had an undivided interest in the *Hale* judgment as well. And so we're -- we believe that it is fair and appropriate to treat all class members alike, given the status of *Avery* way back when, and given the nature of our RICO claim.

So, again, I think we have met that standard as well, and I don't believe Marlow disputes that. What she does dispute is that she claims that this settlement is unduly burdensome on her because it adds a deposition requirement on an objector versus somebody else who's not objecting. And as we have briefed, Your Honor, there's no rule that the Court cannot, in its efficient -- in its efforts to efficiently run a case, insure that objectors

have certain obligations to come forward and to explain themselves, why they did what they did, and also to demonstrate whether or not they have standing. We offered substantial case authority demonstrating that the Court has that ability and exercised it appropriately here.

So there are also some other factors that the Seventh Circuit looks to when it's evaluating whether or not final approval is appropriate that are not explicitly mentioned in the 23(e)(2) factors, and I'm just going to briefly go through those.

One factor that the Seventh Circuit has identified that's not explicitly mentioned in 23(e)(2) is whether or not -- is to look at the amount of opposition to the settlement, and we submit, Your Honor, that the response to our notice program has been overwhelmingly positive. The fact that we sent out individual notice to over 1.43 million, million class members and did a nationwide publication notice, an expensive notice program, and after all of that, given that we have 4.7 potential -- 4.7 million members of the class potentially, we got all of one objection. That's pretty amazing, and in my practice probably unprecedented to have so many people, so many members of the class, millions of class members who get individualized notice and yet you get only one objector. We calculate that that one objector amounts to .00002 percent

of the estimated class. Obviously, that's just an extremely positive response and I think it is a strong presumption of the validity and excellence of the settlement itself.

We have cited to you many, many cases where there's been a response rate of 99 percent, and here I would -- and the courts say those are -- have a presumption of validity for final approval. Here, it's 99.999 percent. I mean we really were very, very pleased with our response and I think it demonstrates the propriety of the settlement.

Another Seventh Circuit factor is the stage of the proceedings and the amount of discovery that was completed at the time the case settled. I think Your Honor said it at the time of preliminary approval, that you can't -- you could not imagine that parties, by Your Honor included, and the parties, could have known more about the strengths and weaknesses of their case other than had the case gone to trial because we had litigated the bejabbers out of this case. And I think that factor is a very, very favorable factor for us; that is, we settled after a jury had been impaneled, after all the pretrial rulings had been made. We had a very good understanding of our case, where we stood, what our chances were, as good as you could possibly have in litigation short of knowing what a jury or the appellate court would do.

***THE COURT:*** So, Mr. Clifford took some umbrage with

"bejabbers". I just looked in the Black's Law Dictionary. It's there.

***MR. CLIFFORD:*** The word of the day was lowdy-dowdy.

***THE COURT:*** That's not in there.

***MR. CLIFFORD:*** I was going to look up "bejabbers". Now we have two words this week.

***MR. NELSON:*** I used "bejabbers" because I'm in the midwest and I think that might go well here. I don't know.

The last factor that I think is a Seventh Circuit factor that's not specifically addressed in 23(e)(2) is the opinion of qualified counsel. And, Your Honor, our team, and our extensive team of very experienced class counsel wholeheartedly and unanimously endorsed this settlement. And so, I think, stepping back, looking at the settlement, $250 million we think is an excellent settlement. This was a very difficult case, a novel case, an important case. We think we shined the spotlight on something important, and our class members are all going to benefit from the work that was done. And for all these reasons, Your Honor, we believe that we meet the 23(e)(2) factors as well as Seventh Circuit factors, and that the Court should grant final approval of the settlement.

***THE COURT:*** Thanks, Mr. Nelson. Anything else?

***MR. NELSON:*** I'm happy to address the fee issues. Obviously, that's an important motion for us, and so I can

do that now or if you want to -- if we want to talk further about the final approval, I'm happy to do that, too.

***THE COURT:*** You can address the fee issue.

***MR. NELSON:*** Okay. Thank you, Your Honor.

As the Court is aware, class counsel seek a fee of one-third of the common fund. And under Seventh Circuit jurisprudence, to determine whether that is a reasonable fee and reflective -- whether it's a reasonable fee requires that we look to the ex ante market price for class counsel's services. And so what does that mean, the ex ante market price for class counsel's services? How do you determine what that should be in this case?

The Court in *Synthroid*, the Seventh Circuit in the *Synthroid I* decision described several factors that should go into that analysis. The first is the actual agreements between the parties as well as fee agreements reached between sophisticated entities in the market for legal services. The second factor is the risk of nonpayment at the outset of the case. The third factor is the caliber of class counsel's performance. And the fifth factor is the information -- is to look at information from other cases, including fees awarded in comparable cases.

And I'd like to, Your Honor, go through those *Synthroid I* factors to try to assess whether or not our requested fee is consistent with what the ex ante market

price for our services would be.

So the first benchmark is the actual agreements. We've submitted our agreements here, Your Honor. They are 40 percent retainers, but I understand that our retainers with our class reps may not necessarily be reflective of what a -- for example, a large corporation might do if it were to retain counsel on a contingent basis. And according to the Seventh Circuit, you need to look at those types of relationships to try to determine what the ex ante price should be in a case such as this. So while we do have the 40 percent retainers from our clients, we've also submitted, Your Honor, a really extensive amount of evidence, and specifically, empirical evidence from our three experts who have analyzed this extensively, and we've put that information before you.

Specifically, Professor Silver, he has included empirical evidence to the effect that a one-third fee or more in risky complex litigation is quite common, and he also says, as well as Professor Fitzpatrick, that when a case goes to trial the percentage fee typically goes up. And according to Professor Fitzpatrick, it can go up as high as 50 percent if a case is going to trial. So according to Professor Silver, there's substantial empirical analysis to support a one-third contingent fee amongst sophisticated purchasers of legal services, but then the price goes up if

the case goes to trial. So when looking at this factor, Your Honor, I think it supports -- that is, the fee agreements -- it supports the request for fees.

The second factor, the *Synthroid I* factor, is the risk of nonpayment. And, according to Silverman, the greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel. I would submit, Your Honor, that the risk of walking away empty handed here was very, very high. We've talked about all the many motions that were filed and how we could have lost on any one of them, certainly the dispositive motions, and been out of luck and walked away empty-handed. But we've also submitted some evidence on this, one of which was the fact that RICO cases in particular are extraordinarily difficult and have a great likelihood of litigants or plaintiffs walking away empty-handed. Apparently, the success rate -- and I'm glad I didn't know this at the outset of this litigation -- is 2 percent. It's unbelievable. And that's based on a statistical analysis of all -- of RICO cases, and it's contained in *Gross vs. Waywell*, which is a Southern District of New York case. I'm just quoting:

> "The statistical record indicates that 98 percent of the RICO appellate cases surveyed, which do not include RICO actions

dismissed by the District Court but not appealed, plaintiffs and counsel invested extensive time and energies in litigating, only to come away with a total loss."

And the -- in addition to the fact that we brought our action under RICO, in terms of it being risky, we had a completely novel theory: The idea that there was a tainted tribunal and somehow briefs could constitute RICO acts. All of these things were extremely challenging, and extremely challenging ex ante, at the outset. You know, I started thing about when my firm decided to get back into this litigation. We have an executive committee that looks at -- you know, decides whether to get in, and I can -- we got in, obviously, and others did too, but there were not a lot of firms, you know, looking to be part of this litigation. It was perceived as an extremely uphill venture. It was also perceived by us as an extremely important case, one that we had to do, but we did it thinking that there was a substantial likelihood that we would walk away empty-handed.

Another factor that goes to the risk here is that we uncovered the fraud entirely on our own. That is, most of the -- the alleged fraud. Most of the cases, most successful class action cases follow upon government investigations, particularly in antitrust context, sometimes also in the securities context, but here we were working

without any kind of model. There had never been a case like this before. We were treading entirely on new ground throughout.

According to Professor Fitzpatrick -- and I thought this was a rather remarkable statistic -- he describes that private lawyers were the first to discover fraud only 3 percent of the time. Three percent of the cases is there not some kind of governmental investigation that precedes the filing of a lawsuit. That's an amazing statistic. And I think for all of these reasons, our experts -- and these experts, I don't know if Your Honor is familiar with them, but they truly are the most experienced and respected experts in the field. They've been cited, each and every one of them have been cited probably hundreds of times by courts throughout the country and including many, many times by courts in the Seventh Circuit, including the Seventh Circuit itself.

But, according to Professor Silver -- I found this particularly moving -- he said, "This is one of the most important lawsuits of my lifetime and also one of the riskiest as every relevant metric shows." That's a profound statement by a very experienced, accomplished academic who's been at this for more than 30 years. Professor Rubenstein identified a dozen independent factors that demonstrate the riskiness of the case viewed ex ante and that were born out

by the arc of the litigation. And, Fitzpatrick, Professor Fitzpatrick said, "It's a gross understatement to say that this case involved above average risk."

And yet, despite, you know, the novelty of this case, the difficulties of this case, the fact that it was a RICO case, the fact that we uncovered the alleged fraud on our own, the fact that we had a completely novel approach and theory and no model to work from, Marlow seems to believe that this case was not very risky, and he -- excuse me -- she argues that by the time of trial when the case settled things looked pretty good for the plaintiffs and that, of course, we would have gotten our $7 billion verdict.

But when you look at -- and I think this is important: When you look at what the percentage fee should be within the Seventh Circuit, you don't look at it six years in, you don't look at it after you've won motions for summary judgment and all of the dispositive motions and gotten some very good rulings on motions in limine and pretrial motions. You look at it ex ante, in the beginning -- in this case, 2011, 2012. You don't look at it at 2018, a week before trial. The ex ante market here, we think, Your Honor -- I mean it could justify a much higher fee than what we're asking for, and I know we're asking for a lot, but the ex ante risks here were in many respects

unprecedented for the reasons I've described.

The other *Synthroid I* factors include the quality of class counsel's performance, and I think -- I don't know if you can -- if you're biased against us because we gave you so much to read, but --

***THE COURT:*** I thought about it.

***MR. NELSON:*** -- but a lot of work went into this case, high-level work, high-level litigation work. This is not one of those cases where you have document reviewers, you know, who never see the light of day and who are just doing their thing. Here you had lawyers litigating serious motions day in and day out, meeting with Magistrate Williams weekly pretty much for several years. This was a different kind of litigation that involved all hands on deck all the time for many years at a time.

Another *Synthroid* factor is the information from other cases. And, again, we've provided empirical studies. Professor Rubenstein, for example, he looked at Seventh Circuit cases and the cases within the Seventh Circuit and observed that the average awarded fee in the Seventh Circuit is 31.6 percent. 31.6 percent for the average fee in the Seventh Circuit. This case was not average for all the reasons that I've suggested, and it also wasn't average in the sense that the case went to trial. We selected a jury, we knew everything about this case. And

according to Professor Rubenstein, trials are very, very rare, as we all know, but according to his data, in the eleven cases that proceeded to trial in his database, the mean fee award was 36 percent, with five cases having awards of 38.9 percent or more, and three of those having fee awards of 40 percent or more. So it's not uncommon for cases that go to trial to be rewarded to class counsel because they went to trial, because they put in the work, they put in the time, they put in the effort, and they got, presumably, maximum value because they went to trial.

Marlow argues that a third is unreasonable here because megafund settlements are different, that megafunds come with a lower percentage fee. He ignores -- or she ignores the fact that the Seventh Circuit, in *Synthroid I*, expressly rejected a percentage cap on megafund recoveries because "private parties would never contract for such an arrangement." That's true. Why would you ex ante penalize your lawyers for being as successful as they could possibly be? Makes no sense. And there's some academics and some judges as well who think that the opposite should take place; that is, you should, you know, taper upward as the recovery goes up. But in any event, the idea of a megafund cap in the Seventh Circuit is not the state of the law.

Professor Silver, as I mentioned, cites at least 20 cases in which courts awarded 33 percent or more recoveries

between a hundred -- involving recoveries between 105 million and 974 million, so he -- and I would urge Your Honor to look at Table 2 of his report, which recounts those cases. So the idea that there's some megafund cap or megafund lowering, it just is not borne out by the empirical data from the field.

And I'd also like to refer Your Honor to a recent case, just came down this week, it's called *Syngenta*. It's out of the District of Kansas but it's a case in which there was a one-and-a-half billion dollar settlement.

***THE COURT:*** Can I save you some time? I'm involved in that as one of the three judges deciding the fee, so just skip over that part. Keep going.

***MR. NELSON:*** Will do, Your Honor.

I'd also suggest that the Seventh Circuit's decision in *Silverman* does not mandate otherwise. In *Silverman*, the Court said that 27-and-a-half percent of $200 million, and I'm quoting now, "may be at the outer limit of reasonableness." But the Seventh Circuit, in *Silverman*, didn't get rid of the notion that you had to approximate the market rate that prevails between willing buyers and willing sellers of legal services, and so 27-and-a-half percent might have been the outer limit of reasonableness in *Silverman*. *Silverman* was a securities case.

We know that, in *Synthroid I*, the Court says, well, why would you hold a percentage recovery in a securities case, make it applicable to a difficult fraud case, which Synthroid was? You shouldn't do that. And by the same token, we would say why would you -- if *Silverman* said that 27-and-a-half percent might be the outer limit there, it should not apply to this much more difficult case where there's no -- it's not a cookie-cutter type case, there's no model, there's no precedent for the work that was done or the case that this was.

***THE COURT:*** I agree. My reading of *Silverman* is exactly the same. That's really the outer limit perhaps for *Silverman* but that really has no additional value or even instruction as far as other dissimilar cases.

***MR. NELSON:*** So one last criticism from Marlow is that the Court should adopt a declining down, a tapering down of the percentage fee as the recovery goes up. And I would suggest a couple things: One, *Silverman*, which is what Marlow relies on for that, did not follow that model. In fact, it affirmed a flat fee, as the Court is aware.

I want to just cite this dairy farmers case because the quote is so fantastic. In dairy farmers, the Court observed that a -- that the declining percentage approach, "is not a one size fits all recovery scheme, and there are many other factors to consider before declaring this pricing

grid the Cinderella slipper."

So we would submit, Your Honor, that the Cinderella slipper, a declining approach to the percentage fee, doesn't apply here. No sophisticated buyer, purchaser of services in a case as novel as this would ever require that, and nor would lawyers accept it. Just shouldn't apply in this case, and for a number of reasons.

And -- excuse me. Before I get to those reasons, I want to also cite to the *Young* case, *Young vs. County of Cook*, Judge Kennelly, where he also rejected the declining percentage, and he said, "Why not, because of the high risk of nonpayment in that case, the enormous amount of work that went into the litigation, and the fact that counsel had turned down an earlier settlement offer in a successful effort to obtain more for the class." And I think the reasoning by Judge Kennelly makes good sense and is applicable here. We went through a year of mediation. We were offered, you know, monies. If, you know, this declining, you know, fee approach were in place, who knows how -- excuse the incentives for class counsel? Just, it doesn't make sense for this kind of a case. And I note in that case, Judge Kennelly affirmed the 33 percent contingent fee of the total recovery, and he said it was at the low end of what is typically negotiated ex ante by plaintiffs' firms taking on large complex cases.

So, to conclude, Your Honor, on this issue, I would say that this case is in many respects in a league of its own. It was brought under a statute that almost never rewards plaintiffs. It relied on a novel, untested theory. It was accompanied by extreme risk of nonpayment. It required an enormous amount of work and it settled only after trial had begun. And these, I would submit, are all the relevant factors that go into what an ex ante analysis should be, and in every way I think we deserve to get compensated at a one-third percentage fee based upon this ex ante analysis.

One last aside note: Marlow contends that the percentage must be calculated after deducting any awarded expenses, and, in response, we've cited cases to show that courts in this circuit routinely do not do that, and those cases are cited in our brief.

We also provided the Court with a lodestar cross-check. We're not required to do that. The Seventh Circuit doesn't use it necessarily. But out of an abundance of caution we think it is appropriate for the Court to at least consider it. And we provided, as you know, our timesheet, our time records, our summary time records which demonstrate that we've worked over 55,000 hours in this case, and our lodestar's approaching $30 million. Marlow seems to argue that our lodestar is too

high. I don't know how he could possibly know why it's too high since he wasn't around during the six years of the litigation. But, according to Professor Rubenstein, that amount of lodestar is below the mean in cases that have settled or resolved for 200 -- in the $250 million range. So that amount of hours is not exceptional in any way, just below the mean.

Also, we've provided you, in connection with our lodestar, our billing rates. We would submit, according to Professor Rubenstein, that our rates are consistent with the rates in the Northern District of Illinois, a little bit higher than the local rates, market rates in St. Louis, but only marginally so. And I would submit, Your Honor, that Your Honor's *Beesley* case, where you set rate was then followed by the *Spano* case a couple years later where they raised those rates to account for inflation. If we applied those *Spano* rates to our lodestar, our lodestar -- our -- it would reduce our multiplier. Our multiplier is currently 2.83, which it's really less because we've been doing a substantial amount of work since the -- since we filed our papers, but if we applied the *Spano* rates, which are higher than our rates, the multiplier would be 2.11. And, again, that's well within a range of reasonableness and demonstrates that we're not getting a windfall as it were.

We also are submitting our costs to be reimbursed,

Your Honor, and Professor Rubenstein also looked at those costs. He has determined that those costs are about average; in fact, somewhat low compared to the mean in large cases. Apparently, I didn't know this, but the mean is approximately 4 percent of the value of the case, and here it's -- our mean is 2.8 percent, so less than is typical in terms of the amount of costs that we are seeking reimbursement for.

And we also submitted a declaration indicating that those costs are less than our true costs. We have considerably more costs than what we're seeking, but those are the costs that we put in our fee application, which we filed in October. Many costs came in subsequent to that time and we're not seeking reimbursement of those costs. Those costs will be reimbursed out of any fees that the Court awards.

Your Honor, that's all I got.

***THE COURT:*** I have no questions. Thanks very much.

Would anybody on the defense side wish to speak?

***MR. NELSON:*** Your Honor, excuse me. I apologize. My co-counsel has reminded me there is an important -- one remaining important issue.

Marlow does object to the size of the service award to our class representatives, each of the three representatives. He took exception to the fact that they

did not file affidavits or declarations in connection with our fee request and their service award request. They have all filed declarations now that are part of the record in the case, and, as Mr. Clifford said at the opening of the hearing, they've showed up. Marlow didn't show up, but they showed up, and they've showed up for a long time. And, in fact, those three representatives were here in *Avery*, so they've showed up for the better part of 20 years in connection with this case. $25,000 is not atypical. In fact, it's pretty much right in the range. I guess maybe a little higher, but it's not higher given the six years of this litigation and their commitment in *Avery*, which really together you're talking about an unprecedented commitment to a case and to this. Again, they've showed up.

Thank you.

***THE COURT:*** All right. Thanks.

Someone from State Farm wish to address the Court?

***MR. CANCILLA:*** Your Honor, Joe Cancila.

Just a few sentences. State Farm does support the final approval of the settlement for the reasons we stated in our separate written submission, Document 971. So we don't have anything to add beyond that on the support of final approval.

State Farm is not taking a position in respect to the amount of fees that Your Honor may choose to award.

State Farm has commented on the objection to the extent that the objector has taken issue with the sufficiency of the consideration, and we've contested that argument on behalf of the objector in our papers, Doc. 971.

***THE COURT:*** Noted. Thanks very much.

Anybody for Mr. Murnane?

***MR. CHINSKY:*** Nothing to add, Your Honor. This is Andrew Chinsky.

***THE COURT:*** Mr. Scott, do you wish to add anything for Mr. Shepherd?

***MR. SCOTT:*** No, Your Honor. We would join in the State Farm argument that they have filed.

***THE COURT:*** Thanks very much.

So I agree on all points with Mr. Nelson about the analysis under 23(e)(2), and would note that his statements and description of this litigation are consistent with the Court's findings, that in his statement to the Court he did not engage in embellishment or hyperbole but simply stated the facts as they are in this litigation. So I agree entirely with Mr. Nelson's rationale and argument in this case. He's advocating but he really wasn't embellishing in any way to support that advocacy, so I think he's spot on with respect to his analysis of this litigation.

So, for the record, I would note that in this case there was, in fact, a remarkable notice practice with

respect to direct notice and then general notice targeted publications; that there were notices to 112 public officials, including attorneys general and insurance commissioners from all 50 states and U.S. territories, as well as the Attorney General of the United States and the Federal Reserve; and note that there were no objections from any of those non-class recipients. No class member objected, except for the one that was mentioned by Mr. Nelson, that being Lisa Marlow from the State of Florida.

So opposition by only one out of over four-and-a-half million persons and entities that have relevant concern what the outcome of this litigation is, in this Court's estimation, staggering and obviously favors approval of the settlement. Settlement was clearly an arms length transaction, ultimately facilitated by Mediator Randi Ellis, as pointed out by Mr. Nelson, whom this Court has used in thousands of individual cases, complex litigation, and MDL or mass actions. Ms. Ellis's high character and extraordinary integrity are without debate. I participated in the first segment of the negotiation session with counsel for both sides designated to negotiate on the day a settlement was reached; a day, by the way, when opening statements and the ascertainment of evidence were set to begin. Unequivocally, no collusion can be found. In

fact, as pointed out by Mr. Nelson, a prior mediator appointed by this court, retired federal judge, was unable to facilitate a settlement. There simply is no question about the arms length nature of this transaction.

The case was vigorously defended by State Farm, which presented many serious legal challenges to the plaintiffs' theories of liability throughout the litigation. Defendants to this day vigorously deny the plaintiffs' right to recovery, as they have a right to do. Seven years of discovery, together with countless conferences with the magistrate judge to whom this judge referred discovery management, revealed not only the hard fought nature of the litigation but also helped to lend credence to the true value of the settlement.

In most cases of this magnitude I withdraw the automatic referral to a magistrate for discovery issues, and for some reason decided not to do that in this case, which was one of the better decisions I've made in my career. I had frequent contact with the magistrate judge, often directing logistical and procedural matters but had great familiarity with the matters that arose during the course of this discovery phase and can clearly verify that the representation on both sides was not only skilled but quite vigorous.

In fact, just as the defendants were represented in

exemplary fashion by the experienced and highly skilled counsel who masterfully, in my opinion, pursued the defendants' defense of this litigation, the class is represented by what I would describe as an all-star group of litigators, including a well-known professor, as well as a law school dean, whose talents and skills have afforded him really celebrity status in the legal profession, in my opinion, regarding Dean Chemerinsky.

A person, including the objector in this litigation, seriously overestimates the value of the Court's ruling in plaintiffs' favor on motions to dismiss and motions for summary judgment by suggesting that those rulings predict a successful outcome at trial. The standard for the defendant to prevail on either is very difficult, and failure to do so does not equate by any means to an assured loss at trial or appeal. To predict with any certainty that this Court would have its decisions on *Rooker-Feldman* doctrine and even, for that matter, *Noerr-Pennington* doctrine would be a reckless exercise of speculation.

I struggled with the motion for summary judgment with margin for a private ruling for the plaintiffs extraordinarily slim. In fact, my initial impression was to grant the motion for summary judgment but could not quite support it based on the law and the facts. The predominant

driver of the decision was the factual -- was a factual one and the jury's needed to assess credibility in that respect.

I find it quite likely plaintiffs would not have prevailed at trial, not only because of empirical studies demonstrating the tremendous disadvantage plaintiffs in these types of litigation in attempting to convince a jury of fraud has, but clearly this case, different than a judge sitting and looking at a motion for summary judgment, was going to have a jury observe and watch the witnesses testify, live for the most part from my contemplation, and so that I think would have made the case even more difficult, honestly, for the plaintiffs. My perception was that so much of the plaintiffs' success in this case was dependent on the perception the jury had of Chief Justice Karmeier during his expected testimony. Having read his deposition, as well as a personal familiarity with the chief justice, I firmly believe a Southern Illinois jury would have had a difficult time not believing the chief justice and, instead, would have found him credible, and a likely defense verdict would have resulted.

The objector, through her counsel, speaks in concrete terms regarding just how sure she is of the likely success plaintiffs would have in this litigation. In doing so, she's only privy, I presume, to the docket sheet memorializing the in-court events of the litigation. She

cannot possibly, nor can her lawyer, have familiarity with this litigation, this judge, and the counsel of record possess. Had plaintiffs prevailed at trial the Court would not have awarded post-judgment interest. The plaintiffs sought, dating back to the original *Avery* judgment, a decision which I felt I foretold when ruling on the defendants' motion in limine. Whether the Court would have trebled the damages was a serious question not yet determined by the Court, but given the strength of the plaintiffs' case, the trebling is rank speculation at best. However, in light of the authority in this area, the Court's consideration of the likelihood or not of trebling really is not a relevant factor and is just simply a nonfactor in this case both for that reason and because of the speculative nature of that -- of such an order.

One of the issues for trial, as framed by the final pretrial conference, centered around the filing of the complaint in this case and whether the timing of that filing comports with the statute of limitations. The issue was a significant impediment, it would seem, to plaintiffs' path to a positive result. The trial would have been heavily dependent on expert testimony as well as Chief Justice Karmeier's testimony, and a great many disputes were identified relative to those experts.

Plaintiffs do not prevail in every *Daubert*

consideration for all their experts, neither did the defendants. It's difficult to tell how the overall impact on the ability of the plaintiffs to supply to the jury all the pieces of the puzzle, if you will, necessary for a positive result without those experts who were excluded. So, all in all, the risk factor in this case strongly outweighs the likely success factor and clearly favors the settlement agreed upon.

The amount of settlement more likely than not overestimates that plaintiffs' odds of winning the day and this jury but certainly there's a, I think, firm argument that it comes very close to suggesting just what chance the plaintiffs might have had. That factor alone, would seem to me, suggests adequate, fair, and reasonable settlement. The likely experience of trying the case clearly would have been far greater than the usual class action. Case was set to be tried over a period of a month, and even though the costs were below average up to that point in time, unquestionably the costs would have ballooned substantially.

There's a large contingent of plaintiffs' attorneys. None of them are that local. Trish Murphy is from Southern Illinois but the others were, by and large, from distances far and wide, which would have insured a huge expense for plaintiffs for travel, lodging, and meals. The litigation support necessary for such a lengthy trial would

have been extremely large based on the Court's experience in presiding over large, complex cases. The cost of putting live expert testimony on, and, of course, the trial, in my experience, likewise is substantial. Defense counsel would have experienced similar expenses as plaintiffs except they would have had less costs for needs consumed by a lesser number of lawyers.

In light of the extreme risk identified by the Court, the better course of action, it strikes this Court, was to avoid, to the extent possible, such high costs. The allocation of distribution plan of the settlement is fair, reasonable, and efficient in its efforts to put money in the hands of the millions of class members and the manner -- the way in which the plaintiffs are going about that distribution is extraordinarily creative and innovative and places a very small burden on a class member to make that claim, let alone those class members who aren't even required to make a claim but would receive a benefit automatically.

Clearly, both sides benefited greatly from a settlement that established a substantial amount of money to be recovered while hedging against the likelihood of a result favoring the defendants while at the same time buying peace in the litigation, which, from the perspective of the defendants, had extended over a period of time that began in

1997, and included seven years in the *Hale* case alone. Without a settlement, plaintiffs and defendants faced the prospect of many more years of litigation and great uncertainty regarding the outcome. The settlement agreement in this class action fulfills the requirements for approval set out in Rule 23 and the Seventh Circuit jurisprudence. Court finds the settlement agreement in this case to be fair, reasonable, and adequate, and grants final approval of the settlement.

While I have passed the rule to show cause relative to Ms. Marlow, I see no need to pass on the issue of her objection. I think the rationale I just set out, and some more that I'll set out with respect to attorney's fees, clearly demonstrate that her objection is not well-founded. Her lawyer engaged in a great deal of hypobole and speculation and a suggestion of knowledge he could not possibly have possessed, and even if he possessed some more knowledge than simply looking at the docket sheet, he clearly was wrong on every point that he brought up in the course of the objection he fashioned for his client. I might say at this point, even though I passed on the motion -- or the rule to show cause, he even suggested that when I said that the objector would have to be prepared to argue the merits of the case, he interpreted that as my directing her to make those arguments, which is just

ludicrous. When somebody refers to the plaintiff or the defendant and making arguments, the judge isn't talking about the individual litigant, for heaven's sakes, but simply the representative for that party, and so that told me a lot about how he goes about gathering his information and how he was able in some fashion or another to make the statements he made about such things as risk and the likelihood of recovery and the amount of money, presuming that $7 million -- $7 billion was going to be awarded. It's just stunning to me. So, all in all, there's no question that no aspect of his -- of the objection that he filed on behalf of Ms. Marlow is valid in the least, and the rest of it will be mentioned in my rationale for the attorney's fees.

Also note that all of the class members are being treated the same, and so that aspect of Rule 23 certainly has been met as well. So, as Mr. Nelson started to allude to, and I stopped him, I hope not rudely, but I am participating with two other judges -- and this really goes to the issue of the marketplace, I think. And Mr. Nelson pointed out that it was a settlement of $1.5 billion. So the way that mechanism is set up, there's an MDL case the Kansas City, there is a -- there are mass actions here in this court, and there are a number of individual cases set up in Minneapolis as well as other places around the

country, but those are the three primary places. And so in the settlement agreement that the Court approved, it was the request of the plaintiffs that each of the three judges in the major litigation areas be consulted by Judge Lungstrom, who's running the MDL, with respect to fee issues. So next week we'll deal with the individual allocations to lawyers, but at the time of the preliminary approval -- I'm sorry. At the time of the final approval of the settlement, Judge Lungstrom announced that the unanimously agreed upon rate of 33-and-a-third percent in that case where the pool is $1.5 billion, rendering a fee pool of 500, little over $500 million. We did that with the understanding, the belief, and the finding that that was consistent with large class actions across the country, and given particularly the many complexities that that case had, though I must say I don't think it had the complexities this case had by any stretch of the imagination. Because the case that we're dealing with here is very unique, unlike any reported case, as far as I can tell, given the posture of the case, the legal challenges to recovery, the really decades long disputes, and extraordinary time spent by counsel for the plaintiff, as well as the tremendous risk taken by counsel in pursuit of a favorable outcome, the theories pursued by plaintiffs were unprecedented. There's no question that the amount of fees being requested is a reasonable request.

Mr. Nelson was not of sure my familiarity with the three experts that he alluded to, three prominent law professors. I'm personally acquainted with Brian Fitzpatrick and with Bill Rubenstein, having sat with them on a number of panels at conferences and having listened to Judge Rubenstein now over the last many years address the MDL judges conference. I hold them in great esteem and find that their opinions in this matter are really the leading opinions in the country for issues with respect to fees. And I'll talk a little bit more about that in a minute, but I was amazed, if not stunned, at the discussion in the objection with respect to the *Silverman* case. As I stated before, I clearly have the same interpretation that Mr. Nelson has, and the suggestion that the Seventh Circuit has determined that the outer limits of of reasonableness for attorneys fees in megafund cases is 27.5 percent is simply a misrepresentation of that case and its holdings. I'm not sure if it represents an intentional misrepresentation or just a total lack of understanding of what Judge Easterbrook did in that case. He quoted Judge Easterbrook's dicta, but as I indicated, my reading of the case is that for that particular case Judge Easterbrook opined that that was -- that might be the outer limit but does not stand as precedent for all so-called megafund cases.

He does quote other dicta from the case, though not directly, and only in reference to a quote in another case. In other words, he quoted the language, then he cites another case, and instead of just going to the *Silverman* case, he used it, the quote from another case, which didn't make sense to me, but that quote, that dicta has to do with the prevailing market rates and how they impact a Court's award of fees, but the objector simply ignores that part of the analysis, though he gave -- paid lip service to it, but simply failed to conduct further analysis in that regard.

I would acknowledge that in most class action cases it's wise to set a fee at the outset. Mr. Nelson recognized the problem with this because at the outset there was surely well-known risk that anyone could have recognized with respect to the undertaking of the theories that were pursued in this case. At first blush I looked at the complaint and thought, well, this won't take long. Well, one of the dumber decisions I've made in the course of my career. If I were to have set some fee up front or conducted some option, I can't imagine that the fee would have been less than 40 percent; likely more like 50 percent.

The methods that have been suggested by the objector in this case were really stricken by -- really eliminated by the *Synthroid* case, *Synthroid I*, suggesting that there should be a cap on the fees, as once it's

determined the settlement -- I mean the class constitutes a megafund. Judge Easterbrook rejected that notion about a megafund cap and said that it should not trump the market analysis. Since the district judge had not performed such an analysis, he reversed and remanded that particular case for that purpose.

The case at bar alluded to the amount of work performed by counsel in pursuing this case wholly against the odds of recovering anything, though the lodestar comparison is interesting just for that, a comparison, it's not favored these days and certainly should not be considered by anybody as some final arbiter of the issues, but if we were to engage in that comparison, class counsel notes they have expended 55,300 hours to these efforts, which translates, at least as of the time of their filing -- Mr. Nelson points out it's much higher than than that now, so that their lodestar is close to $30 million, resulting in a multiplier of 2.83 for the ultimately -- the ultimate requested fee amount. That lodestar is arguably low for the risk in this case, as confirmed by the academic witnesses, but is certainly not excessive. Clearly, a lodestar greater than that could have just as easily been supported.

The named representatives have been virtually tortured by the subject matter of this litigation for two decades. They've expended a great deal of time, they've

been submitted to -- they've had to submit to depositions. They've experienced exhaustion, euphoria, disappointment, frustration, back to maybe a little bit of euphoria, if for nothing else other than this is done. For all of these things, and particularly their involvement for all this time, even if one only examines the last seven years, they're entitled to at least the class representative payments that have been suggested by counsel. They're consistent, by the way, with our *Syngenta* litigation where we have literally dozens of representative persons, and their service awards are sort of a hodgepodge sum at a higher amount, not unlike the service award here, and others much lower, just simply depending upon the nature of their efforts.

So each of the declarations attached to the motion for fees and expenses provides tremendous insight into the efforts that went into securing a positive result for the class in this case. As for the law professors I mentioned earlier, Charles Silver from the University of Texas, a 48-page report with his 12-page resume attached; Brian Fitzpatrick, who's a Vanderbilt professor, now serving in a visiting capacity at Harvard law, 20-page report with a 9-page resume. Of course, he's considerably younger than Charles Silver. And William Rubenstein of Harvard Law who is really, in my opinion, considered by the consensus of

legal professionals to be the nation's leading class action expert, particularly in the areas of fees, and as I said before, a mainstay at the MDL judges conference where I have listened to him and spoken with him repeatedly. It provides great insight into prevailing marked treatment for cases such as these. The approach each takes on the subject of fees has always been considered by me to be a somewhat conservative approach, not unusual or unexpected given the subject matter.

As Mr. Nelson pointed out, Professor Silver examined the market forces on fees charged by attorneys and awarded by courts as well as a thorough empirical study of many cases with fees awarded, including a great many so-called megafund cases. Silver's well-documented conclusion was that the requested fee amount was reasonable, within the Court's discretion to allow, and even went on to encourage the Court to award the fee requested. He noted in the process that this case was one of the riskiest pieces of litigation he had ever examined.

Professor Fitzpatrick noted that the Seventh Circuit is unique among federal circuit courts for requiring district judges to hypothesize a market for legal services and to approximate the market rate. Fitzpatrick referred to this case as one where the class has "negative expected value claims." The risk in this case would

certainly insure that the class would opt to pay their lawyers on a contingent fee basis. He referred to empirical data to note that the market rate in Seventh Circuit in a great many cases, which reflect a 33-and-a-third percent contingent contract, mean of 27.4, median of 29 percent, but the professor opined that the higher 33-and-a-third requested here was justified since it did go to trial. Very few do that, even if it didn't finish trial. That makes this case extremely rare when compared with the empirical study that he refers to, which is Professor Rubenstein's study. This case progressed farther than 98.7 percent of class cases.

The market rate for cases that go to trial typically are higher than others, commonly commanding a 50 percent fee. In addition, the cases in the empirical study he conducted included cases of every ilk, easy to hard. He opined that, to say the least, this case had above average risks was "a gross understatement," as Mr. Nelson likewise, and in light of that, the higher fee request is reasonable.

Professor Rubenstein maintains a database of over a thousand class action lawsuits. He had a great deal in his declaration regarding empirical research on fee issues in class cases and he's applied those to this case to form his opinions. In his opinion, the fee requested here is

reasonable. He found a multiplier applied in this case by class counsel to be consistent with multipliers in similar cases; in fact, empirical data would support a higher multiplier. When suggesting the risk, Professor Rubenstein examined the following factors: Novelty, complexity, detection, which means not based on a government investigation, but detected, investigated, theorized, and executed entirely from scratch. Uncertain liability, uncertainty of settlement, riskiness of trial, well-funded defendant, well-represented defendants, vigorous defense, high expense, opportunity costs, and no residual upside, all of the factors found in the *Hale* case at the top of the consideration of each of these factors which Mr. Ruben -- which Professor Rubenstein closely examined. He found a number of factors suggesting the class counsel did a great job, achieving a positive result, such as counsel obtaining significant monetary relief, a hundred percent of the class being eligible, obtained cash, made claims to be very easy. Settlement required significant contested adversarial litigation; as Mr. Nelson alluded to, an incredible number of contested motions in this case. My memory may be failing me but I think there were over a hundred, were there not? Just an amazing amount of litigation within this litigation.

So the professor -- that is, Rubenstein -- concluded the fee percentage is reasonable. Class counsel's

blended rate was reasonable, their total number of hours reasonable, the multiplier. He thought the overall request quite reasonable.

Court finds the evidence is in support of the fee request, establishing that the fee requested is in line with the market practice for large class action cases such as this, with many, many adversities faced by the class counsel. The Court awards fees in the amount of 33-and-a-third percent of the gross settlement amount. I was made privy in these filings to the allocation among various law firms, essentially reflecting an equal split among each of these law firms, with the exception of the Taylor Martino firm, which, if I remember correctly, was to get a quarter percent -- or 25 percent of one-tenth of a share. So, I apologize, I didn't undertake that back because I'm sure the Seventh Circuit would have reversed me on that, so I'll leave that to the parties to allocate in accordance with their fee agreement.

Court finds the expenses to be reasonable and necessary. The costs are only 2.8 percent of the settlement, considerably less at the time of settlement than one would expect when looking at similar cases. Category costs as reasonable, subject to reimbursement by the class, the Court awards the costs in the amount requested. The Court -- as I've stated, the Court overrules the objection

of the objector. The objector, as can be gleaned from my rationale that I've just gone through, had simply no basis whatsoever for the objection that was made.

At this point I take it -- and let me just ask this question: I take it that whether or not the objector is a member of the class and, therefore, eligible for a claim will go through the regular administration process and there will be a determination within that administrative process.

***MR. CLIFFORD:*** Your Honor, yes, sir. Robert Clifford. And I believe your comment is correct. But, further, Judge, and mindful of the ruling you've just made about the objection itself and overruling it, we do not think that that ruling is mutually exclusive to the concept of a motion that we would request that you consider, and that is to strike the objection for procedural noncompliance with the preliminary approval order. This objector, in her efforts and counsel's efforts, health issues notwithstanding, which, by the way, were never mentioned in any meet-and-confer we ever had with this gentleman -- that notwithstanding, they did not comply with the requirements of the preliminary approval order. They thwarted, along the way, the ability for us to make a reasonable and appropriate inquiry to that. Even today the line is open and it's a matter of public record that phoning in could have occurred, notwithstanding the discussion in the record that you had

with counsel about that in your orders, but in light of his new filing, it would have been reasonable for him to be on the line. So we would further ask that you consider, for the failure to comply with the preliminary approval order, to enforce the requirements of the preliminary approval order and further consider, therefore, to strike that objection in its entirety. Again, we think that that can coexist with your substantive analysis of it, and denying it for the reasons in the record that you've stated.

***THE COURT:*** It's interesting, I think, that the status of that objection is somewhat confusing because while the Court received a notice from Mr. Downton that he and his client would not be here for reasons previously stated, which are quite varied, but most of which are just vicious attacks on me, but -- and for the medical reasons that he cited in his declaration having to do with his gallbladder issues, but did not, as far as I can tell, ask that the Court continue the issue of the objection, or, for that matter, the rule to show cause.

Does anybody interpret that in any way as asking for a continuance?

***MR. CLIFFORD:*** We certainly didn't, Your Honor. And, frankly, we were looking for one given what was taking place, and so we were -- we tried to be very vigilant about that. And to be clear, given where we're at, given the

record that's been made, given what we now know from the objector, we're not asking for contempt, we're not asking for somebody to issue a bench warrant to send out to the U.S. Marshals to go get the guy. But, that said, we think an order striking the objection would suffice.

***THE COURT:*** So I think that -- I think, so the record is clear of my thought processes with respect to that objection, in a sense your motion is moot because I've overruled and denied the objection. In another sense, to the extent that a reviewing court may disagree with my issue in that respect, I don't think they could possibly disagree with the conclusion that the objection should be stricken. I want to -- I mean the record in this case is clear on what has happened. We have an objector who, under oath, verified that she was not a class member by virtue of not having aftermarket parts, and then some two weeks later tried to withdraw or pull back that verification and in a letter to the claims administrator indicated that, oh, she was mistaken, she did not understand that question, that she, in fact, did have aftermarket parts and, therefore, was a member of the class.

So the process that the Court had set up with respect to allowing any party to depose a class member with respect to the issues of whether or not he or she is, in fact, a member of the class and whether or not their

interests are inconsistent with the interests of the class as a whole, she clearly was one who could have been and should have been deposed in order to fully vet those issues. But through quite a number of evasive actions taken by Mr. Downton, I read through the emails and the letters and it was clear that he was doing everything he could to simply avoid her having to give a deposition, suggesting that it was too burdensome on her, it was too burdensome a requirement as far as the settlement approval order was concerned, but I would suggest that the average class member did not have a situation where they made one statement under oath and then made an effort to withdraw that statement, and had any other class members done that, I'm quite sure that the plaintiffs' counsel in this case would have pursued a deposition of that person.

Mr. Downton took umbrage with my quick and rapid response to the various motions that were coming through, which I did because time was of the essence, and we were upon this hearing, and, in any event, with each and every result made a strong effort to protect the rights of Ms. Marlow. Quite frankly, she wasn't summoned here to make her argument on her objection; she was summonsed here, ordered to appear by the Court by virtue of the order to show cause, the rule on the order to show cause. So I made it clear at one point that, frankly, that's all she was here

for. She could have -- after that was heard, if she showed up, she could have then left and chosen not to defend her objection. I thought that the nature of her objection was part and parcel to whether or not her interests were contrary to the interests of the class as a whole and simply put her on notice that these are things that she can expect when she gets here. Frankly, I didn't want her lawyer to say, *Judge, we didn't anticipate that you'd seek sworn testimony from my client. She's not prepared to do that.* I wanted to avoid that possibility, so I gave her notice.

But, also, I'm a little bit surprised that somebody would suggest, particularly a lawyer, that having somebody come to a hearing is in deprivation of their rights. What better due process rights could I give someone than to have them come here and state their case, for heaven's sakes, and particularly defend themselves on a request that that person be held in contempt of court? So Mr. Downton goes through all this machinations about how his objection and his -- what he's doing for his client is venued in Florida. Well, that judge made it clear that she wasn't going to interfere with our process here. He calls it an invalid order or something to that extent, suggesting that, by December the 19th, we'll get -- we'll determine whether or not the district judge ratifies that order. That process does not exist in that district. It doesn't exist in any district

that I know of. The record was clear that the original judge whose --

***UNIDENTIFIED SPEAKER:*** Judge.

***THE COURT:*** Well, Judge Paul Byron referred the case to Judge Carlos Valdi. That's on the record. And under the rules, if someone disagrees with the ruling made by a magistrate they can appeal that to the district judge, but it doesn't call for an automatic ratification by the district judge of the magistrate judge's order, and so he was completely off base in suggesting that. He suggested that to the Seventh Circuit along with saying vicious things about me -- which is not the first time that's happened, by the way -- and suggested to the Seventh Circuit that this -- that dispute belonged in the Middle District of Florida. I think their denial of his petition for writ of mandamus tells us all what they thought of that suggestion.

So, clearly the obstruction, evasion, refusal to comply with the numerous requests in various forms made by the plaintiffs for deposition was inappropriate and contrary to the procedure approved in the settlement of this case, and I agree for that reason that it should be stricken because it's -- they just simply didn't follow the very simple procedure that had been set up here. So in addition to denying it on its merits, as an alternative finding, I would strike the objection.

So do we have anything else we need to take up, folks?

Congratulations to the named representatives. Thanks for hanging in there. Glad it turned out to be worthwhile for you.

Congratulations to the defense buying their peace in this thing and ending 20 years of litigation. I'm sure everybody feels in some way or another pretty good about all of that. I feel great.

So, thanks. Congratulations. Appreciate all your work.

***(Proceedings adjourned at 10:42 a.m.)***

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**REPORTER'S CERTIFICATE**

I, Laura A. Esposito, RPR, CRR, CRC, Official Court Reporter for the U.S. District Court, Southern District of Illinois, do hereby certify that I reported in shorthand the proceedings contained in the foregoing 57 pages, and that the same is a full, true, correct, and complete transcript from the record of proceedings in the above-entitled matter.

Dated this 21st day of December, 2018.

Laura A Esposito

Digitally signed by Laura Esposito
Date: 2019.01.03 13:24:53 -06'00'

LAURA A. ESPOSITO, RPR, CRR, CRC